RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

CONSPIRACY — RESTRAINT OF TRADE — COMBINATION TO KEEP UP FREIGHT RATES AND EXCLUDE RIVAL TRADERS. — An association of a number of ship-owners was formed to obtain a monopoly of the homeward tea trade, and keep up the rate of freight, by offering a rebate on freight to all merchants shipping exclusively by the association vessels. *Held*, that as the association was formed with the view of keeping the trade in their own hands, and not with a malicious intention of ruining the trade of other ship-owners, or through any personal ill-will towards them, it was not an agreement in restraint of trade, and was not in unlawful conspiracy. The association did not pass "the line which separates the reasonable and legitimate selfishness of traders from wrong and malice." *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, L. R. 21 Q. B. 544 (Eng.).

See *Marshall* v. *Penn. R. R. Co.*, 92 Pa. St. 150, *accord.*

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — APPOINTMENT OF RECEIVER.— An act which provides that, upon the dissolution of a corporation by legislative action, the attorney-general shall bring suit to wind up its affairs, and may, upon application to the court, procure by an *ex parte* order the appointment of a receiver who shall take possession of the property and convert it into money, ascertain and determine the liabilities of the corporation, and distribute the assets, is unconstitutional, because it amounts to a taking of the property without due process of law from those in whom it would legally vest in trust under the laws of the State; viz., the managers and directors at the time of dissolution. "The court has, by virtue of its general jurisdiction over trusts, authority to appoint to a vacant trusteeship, and, perhaps, for cause, to remove fraudulent, dishonest, or incompetent trustees, and appoint others to perform the duties of the trust, in order to avoid a failure thereof; but we know of no authority for a court to appoint a receiver of property vested in trustees, without cause, and without notice to them, or opportunity afforded to defend their title and possession." *People* v. *O'Brien*, 18 N. E. Rep. 692 (N. Y.).

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — OBLIGATION OF CONTRACTS — EFFECT OF REPEAL OF CHARTER ON CORPORATE PROPERTY. — The Broadway Surface Railroad Company was duly incorporated under the laws of New York State, and procured the necessary grants from the city of New York to lay tracks and to run cars over Broadway. It then, as it was permitted by statute, mortgaged its property as security for bonds issued by it, and entered into contracts with connecting lines. In 1886 statutes were passed dissolving the company, and directing the grants made by the city to be sold and the proceeds to be paid to the city, wholly ignoring the rights of stockholders, mortgagees, and contractors. This legislation was *held* unconstitutional, except that portion which operated to dissolve the corporation.

The questions which arose were, first, whether the dissolution of the corporation necessarily destroyed its property, so that the State could do what it pleased with what had been the corporate franchises, without violating the constitutional provision against taking property without due process of law; secondly, what was the effect upon the charter of a reservation of power by the State to amend or repeal laws and charters.

(1.) It was said that the repeal of the charter, under a power reserved by the State, although destroying the corporate life did not destroy the corporate property, except in so far as such property is dependent upon the existence of the corporation for its lawful enjoyment: but that the dissolution of a corporation has no "other operation upon its contracts or property rights than the death of a natural person upon his." As it was said in *Fletcher* v. *Peck*, 6 Cranch, 135, "When a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest these rights." There-

fore the stockholders, mortgagees, and those having contract rights against the corporation were still secured by its property, not being affected by the legislation of 1886, which was an "undisguised attempt to take away . . . its property, and bestow the benefit thereof upon the municipality of New York," without due process of law.

(2.) Even if the Legislature should expressly reserve the power to take away or destroy the property of the corporation acquired under the authority of the charter, it is doubtful if an exercise of such power would be constitutional; but the State is clearly unable to take away or destroy the corporate property, where the same has been lawfully pledged or conveyed, as it was here. Further, it would seem that even the power reserved to the State to amend or repeal the charter is restricted, not giving the right to violate the contract at will, but merely the right to terminate the contract and to regulate, to a certain extent, the internal administration of the corporation. Anything further is repugnant to the contract itself.

It was also said that a statute in force at the time the charter was granted, providing that the State, in altering or repealing the charter, should not impair any remedy for liabilities previously incurred, not only correctly formulates the law applicable to the case, but is part of the contract between the State and the corporation, and as such cannot be violated without coming within the prohibition of the Federal Constitution against impairing the obligation of contacts. *People* v. *O'Brien*, 18 N. E. Rep. 692 (N. Y.).

It should be observed that the majority of the court were willing to dispose of the case on the ground that the suit was not properly brought, but expressed an opinion, as above, out of deference to the minority.

CONSTITUTIONAL LAW — INDICTMENT FOR INFAMOUS OFFENCES. — A crime, the punishment of which is imprisonment in a State prison or penitentiary, although without hard labor, is an infamous crime within the meaning of the 5th Amend. to the U. S. Const. — *United States* v. *De Walt*, 9 Sup. Ct. Rep. 111.

CONSTITUTIONAL LAW — POLICE POWER — IMPAIRING OBLIGATION OF CONTRACT. — *Semble*, that a State statute requiring a reduction in the rates of street-railroad fares is an exercise of police power, and is not unconstitutional as impairing the obligation of a contract entered into between two street-railroad companies to carry passengers at a certain fixed rate. *Buffalo East Side R. Co.* v. *Buffalo St. R. Co.*, 19 N. E. Rep. 63 (N. Y.).

CONTRACTS — GROSS INADEQUACY OF CONSIDERATION — CONCLUSIVE EVIDENCE OF FRAUD. — When a consideration for a contract is grossly inadequate, equity will set aside the contract, upon the ground that such inadequacy is conclusive evidence of fraud. *Phillips* v. *Pullen*, 16 Atl. Rep. 9 (N. J.).

COPYRIGHT — REPORTS OF DECISIONS — JUDGES AND OFFICIAL REPORTERS. — Under Rev. St. U. S., §§ 4952 and 4954, a judge who, in his judicial capacity, prepares the head-notes, statements of cases, and opinions for the published reports, cannot be regarded in such sense as their author or proprietor as either to take out a copyright thereupon, or to convey a copyright title by assignment to the State or to an individual. *Banks* v. *Manchester*, 9 Sup. Ct. Rep. 36.

But an official reporter, although a sworn public officer, receiving a fixed salary for his labors, can, in the absence of statute, take out a copyright on law reports published by him, which will cover all the parts of the book, such as statements of facts, head-notes, index, etc., which are not included in the written opinions of the court. *Callaghan* v. *Myers*, 9 Sup. Ct. Rep. 177.

CORPORATIONS — LIABILITY FOR NEGLIGENCE. — The plaintiff was injured by the fall of seats erected in a negligent manner by a county agricultural society for the convenience of its patrons. *Held*, that the society was liable in its corporate capacity without special legislative enactment. Corporations of the class usually called quasi-corporations, which are mere territorial or political divisions of the State, or invested with governmental functions, or those which are formed without the consent of the persons who constitute them, are "not liable to a private action in damages for negligence in the performance of their public duties, except when made as by legislative enactment;" but those entered into by the persons composing them, generally with the hope of profit, are liable. *Dunn* v. *Brown Co. Agricultural Soc.*, 18 N. E. Rep. 496 (Ohio).

The dictum of the court with reference to the liability of quasi-corporations

seems to be correct only if, under the term "public duties," those duties are meant which are imposed alike upon all quasi-corporations of the same class, and those duties are excluded which follow from the management of property or the possession of rights which a quasi-corporation has voluntarily assumed for its own advantage as a corporation, or which have been imposed upon it with its own consent, express or implied. With reference to such duties the same rules apply to public as to private corporations.

CRIMINAL LAW — POLICY OF THE LAW — INSTRUCTIONS. — It is not error for a court to refuse to instruct, that the policy of the law deems it better that many guilty persons should escape, rather than that one innocent person should be punished. *Burgess* v. *Territory*, 19 Pac. Rep. 558 (Mont.).

DAMAGES — INTEREST. — Interest cannot be added by the jury to discretionary damages awarded by them for a personal injury. Only special damages, computable upon direct or indirect evidence of actual values, can be thus increased. *Western & A. R. Co.*, v. *Young*, 7 S. E. Rep. 912 (Ga.).

EVIDENCE — PRIVILEGED COMMUNICATIONS — WAIVER OF CLIENT'S PRIVILEGE. — Where a defendant enters upon a line of defence involving something that has transpired between himself and an attorney, whose client he was, and testifies to the same, he thereby loses his right to object to the attorney's testimony as to the same matter. "The privilege is that of the client alone," and is thereby waived. *Hunt* v. *Blackburn*, 9 Sup. Ct. Rep. 125.

EXECUTORS AND ADMINISTRATORS — SET-OFF — DEBT BARRED BY STATUTE OF LIMITATIONS. — In an action by a legal representative of deceased to recover his distributive share, an administrator cannot set off against the claim a debt of the plaintiff to deceased which is barred by the Statute of Limitations. *Harrod* v. *Carder's Adm'r*, 3 Circ. Ct. (Ohio) 479.

The following are in *accord* with the principal case: *Drysdale's Appeal*, 14 Pa. St. 531; *Reed* v. *Marshall*, 90 Pa. St. 345; *Milne's Appeal*, 99 Pa. St. 483.

But see *contra*: *Courtenay* v. *Williams*, 3 Hare, 539; *Rose* v. *Gould*, 15 Beav. 189; *Coates* v. *Coates*, 33 Beav 249; *Gee* v. *Liddell*, 35 Beav. 629; *Hill* v. *Walker*, 4 K. & J. 166; *In re Cordwell's Estate*, L. R. 20 Eq. 644; *Garrett* v. *Pierson*, 29 Iowa, 304 (*semble*); *Cummings* v. *Bramhall*, 120 Mass. 552 (*semble*); *In the matter of Bogart*, 28 Hun, 466.

EXECUTORS AND ADMINISTRATORS — WHEN CHARGEABLE WITH INTEREST. — An administrator who holds in his possession funds belonging to the estate, but does not use them for his own advantage and devives no benefit thereform, is not chargeable with interest. *Smith* v. *Smith*, 8 S. E. Rep. 128 (N. C.).

The rule is laid down in 2 Wms. Exec. (7th ed) 1844, that an executor may be charged with interest when he has been "guilty of negligence in omitting to lay out the money for the benefit of the estate."

EXTRADITION — PROSECUTION OF PERSON EXTRADITED FOR ANOTHER CRIME. — A person extradited from one State to another, cannot be prosecuted in the latter State for an offence other than that for which he was extradited, unless he has had a reasonable time and opportunity to return. *State* v. *Hall*, 19 Pac. Rep. 918 (Kan.).

The court say that this rule of law, when applied to civil cases in this country, "is sustained by nearly the entire, if not the universal, current of authority. When applied to criminal cases, where the extradition is from a foreign country, it is sustained by almost all authority. When applied, however, to criminal cases where the extradition is from a sister State, a majority of the cases is against the rule, and, as we think, without any good reason."

GRAND JURY — QUALIFICATIONS — FORMER OPINIONS. — A grand juror testified that he formed an opinion that defendant was guilty, from testimony heard while sitting as grand juror on another case. *Held*, that the opinion so formed did not disqualifiy him as grand juror in this case. "The opinion which disqualifies is one formed from something heard outside, which has none of the sanction of an oath, and is merely hearsay." *People* v. *Northey*, 19 Pac. Rep. 865 (Cal.).

HUSBAND AND WIFE — SEPARATE ESTATE — TERMS OF TRUST DEED. — A statute forbidding a wife to bind her separate estate by any assumption of her husband's debts, does not prevent the wife from mortgaging, with her husband's consent, and for his debts, property which he had conveyed to a trustee for her

sole benefit, authority being given to the trustee in the deed to mortgage the property on request of the husband and wife. Public policy, it is said, does not demand that the statute be extended "to destroy a power expressly bestowed, and render property inalienable which the donor granted upon condition that it might be conveyed as specified." *Brodnax* v. *Ætna Ins. Co.*, 9 Sup. Ct. Rep. 61.

This is an extreme example of whittling away a statute by judicial construction. The principle of this case seems to be that a statute forbidding certain uses of a wife's separate estate does not apply to her separate estate which was conveyed with an express condition that it might be used in a manner forbidden by the statute.

MORTGAGES — FUTURE ADVANCES — PRIORITY OF LIEN. — To the extent of the sum limited in it, and as against subsequent incumbrances, a recorded mortgage is entitled to priority for future advances made without actual notice of such incumbrances, though it is not expressed to be for future advances, and the agreement making it such is verbal. *Tapia* v. *Damartini*, 19 Pac. Rep. 641 (Cal.).

NEGLIGENCE — CHILD — "DUE CARE." — The "due care" required of a child nine years of age is not such a degree of care as the average child of that age would exercise, but such care as the capacity of the particular child in question enables it to use. *Western & A. R.* v. *Young*, 7 S. E. Rep. 912 (Ga.).

NEGLIGENCE — DUTY OF REPAIRING FIXED PROPERTY ABUTTING ON HIGHWAY. — A public highway which terminated at the boundary of the defendant's premises had been continued by a private way over his land. The defendant built a wall six feet high across the end of the public highway, shutting off the private way. Trespassers pulled down this wall, leaving a remnant about seven inches high across the dividing line of the two roads. The defendant, knowing the condition of the wall, left it for several days unrepaired and unlighted at night. The plaintiff was driving in the night on the public road, on what he supposed to be a continuous thoroughfare, and his horse was injured by the remnant of the wall. *Held*, that he could recover damages from the defendant. Wills, J., "In this case there was a practical invitation to the public to go across this piece of private property belonging to the defendant. Now, if the owner of the premises was aware of the true state of affairs, he must have known that some person or other would be likely, especially in the dark, to drive over the whole length of the road. . . . He had, therefore, a duty cast upon him to prevent the injury." *Silverton* v. *Marriott*, 59 L. T. Rep. N. S. 61 (Eng.).

NEGLIGENCE — VIOLATION OF CITY ORDINANCE — RAILROADS. — It is negligence, as matter of law for a railroad company not to use the precautions for safety at public crossings, expressly prescribed by a valid statute or city ordinance. *Western & A. R. Co.* v. *Young*, 7 E. S. Rep. 912 (Ga.).

See in *accord* with the principal case: *Petrie* v. *R. Co.*, 7 S. E. Rep. 515 (S. C.); *Kyne* v. *R. Co.*, 14 Atl. Rep. 922 (Del.).

PARTNERSHIP — ASSIGNMENT OF FIRM PROPERTY FOR BENEFIT OF CREDITORS. — A partnership is a distinct entity entirely separate from that of any one of its members. An assignment by the partnership, therefore, of all the firm property for the benefit of firm creditors is not rendered fraudulent and void by a failure to include the individual property of the partners. *Trumbo* v. *Hamel*, 8 S. E. Rep. 83 (S. C.).

This case is important in that it adopts the mercantile conception of a partnership as a legal person, and refuses to follow the long line of English and American cases, which treat a partnership as a collection of persons jointly liable.

PARTNERSHIP — WHAT PASSES TO ASSIGNEE OF PARTNER'S INTEREST. — *Held*, that the statute of uses and trusts has no application to an assignment of a partner's interest in partnership property, real and personal, to be held in trust for the assignor, because partnership property, while in the hands of the firm as a legal entity, is to be treated as personal property; and furthermore, the assignment vested no present interest in specific articles of property, but the right transferred was a mere chose in action entitling the assignee to sue for a copartnership accounting. *Greenwood* v. *Marvin*, 19 N. E. Rep. 228 (N. Y.).

STATUTE OF FRAUDS — SUFFICIENCY OF MEMORANDUM. — Plaintiff's salesman took defendants' verbal order for more than fifty dollars' worth of paints, reduced it to writing and forwarded it plaintiff. Defendants subsequently wrote to plaintiff saying, "Don't ship paint ordered through your salesman." Before the

letter was received the goods were shipped, and the defendants refused to receive them. *Held*, that, in the absence of any evidence that any other order was given, the language of the letter must be regarded as referring to the order of which a memorandum was made by the plaintiff's salesman, and so constituted evidence sufficient to go to the jury, as a memorandum in writing complying with the Statute of Frauds. *Louisville Asphalt Varnish Co.* v. *Lorick*, 8 S. E. Rep. 8 (S. C.).

There is an able dissenting opinion. See also Blackburn on Sales. 2d ed. 44.

STATUTE OF LIMITATIONS — OWNER'S LACK OF POSSESSION — INTERVAL BETWEEN SUCCESSIVE DISSEISINS. — Under the Statute of Limitations of 3 & 4 Will. IV., c. 27, when a disseisor abandons land of which he has taken possession, the seisin thereupon revests in the lawful owner without entry on his part, and the statute ceases to run against him. If, therefore, after an interval in which the land is not occupied, a second disseisor enters, the Statute of Limitations begins to run against the lawful owner only from the time of the entry of the second disseisor. *Semble*, however, that if the possession of the two disseisors had been continuous, the statute would run from the entry of the first disseisor. *Agency Co.* v. *Short*, 13 App. Cas. 793 (Eng.).

That, under this statute, if the second intruder disseises the first, and does not represent the same *persona* or estate, the statute will run against the owner only from the entry of the second disseisor, even though the two disseisins are continuous, see lecture note, 1 HARV. L. REV. 248, at 249.

For the distinction between the Statute of Limitations of 3 & 4 Will. IV., c. 27, which has been followed in some of the more modern American statutes, and that of 21 Jac. I., c. 16; from which they are more commonly copied, see lecture note, *supra;* also Langdell on Equity Pleading, § 111 *et seq.;* and *Chapin* v. *Freeland*, 142 Mass. 383, digested 1 HARV. L. REV. 48.

TRADE-MARKS — RIGHT TO USE AFTER DISSOLUTION OF PARTNERSHIP. — *Semble*, that a retiring partner who assents to the continuance of the business by the other partners at the old place of business and under the old firm name, retains no interest in the good-will of the business, and has no right to use a trade-mark which belonged to the old firm. *Menendez* v. *Holt*, 9 Sup. Ct. Rep. 143; S. C. 39 Alb. L. J. 7.

WILLS — POWER OF APPOINTMENT — EXECUTION. — The testatrix, having general power to appoint certain real estate by will, devised her property as follows: "I hereby devise and bequeath to my two youngest daughters all my property, real, personal, and mixed, and all my estate of every kind whatsoever and wheresoever situate." She had a life interest in the property, but apart from that and from her power of appointment she had no real estate. *Held*, that her intention to execute her power was plainly apparent, because otherwise the will would be inoperative as to real property, and therefore the will was a valid exercise of the power. *Balls* v. *Dampman*, 18 Md. Law Jour. 774 (Md.).

REVIEWS.

A TREATISE ON THE LAW OF CONDITIONAL SALES OF PERSONAL PROPERTY. By Charles R. Miller. Cincinnati: Robert Clarke & Co., 1888. 8vo.

With such predecessors as Lord Blackburn and Benjamin, Mr. Miller has not succeeded in adding anything of value to the law of sales. The last American edition of Benjamin by Judge Bennett has so thoroughly exhausted the subject, that there is little room for discussion which will be of service to the profession; and the author has not discussed mooted questions at all, but contented himself with the collection of authorities. Although he apparently intends to treat the subject of conditional sales exhaustively, he does not cite some of the cases which are landmarks in the field; *e. g.*, *Rugg* v. *Minett*, 11 East, 210; *Turley* v. *Bates*, 2 H. & C. 200; *Whitehouse* v. *Frost*, 12 East, 614, and others. This may be due to the author's inclination to rely exclusively on American cases, which is evident throughout the whole book; but such a feature is not commendable to a thorough student of